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No. 97-6146

In the Supreme Court of the United States

OCTOBER TERM, 1997

ANGEL J. MONGE, PETITIONER

v.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Does the Double Jeopardy Clause apply to non-capital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?

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INTEREST OF THE UNITED STATES

This case presents the question whether the prohibition that the Double Jeopardy Clause imposes on reprosecution after an acquittal of substantive criminal charges applies to noncapital sentencing proceedings. Because the United States as a prosecuting authority is a party to many of those proceedings, and because resentencings are frequently required under the Federal Sentencing Guidelines, the United States has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. On January 25, 1995, undercover officers of the Pomona Police Department who were driving an unmarked car spotted a 13-year-old boy, who motioned for them to pull over. The officers stopped at the rear of an adjacent apartment complex, where police had earlier observed narcotics activity. J.A. 49. Petitioner approached the officers, who asked where they could buy marijuana. Petitioner left for a few minutes, and, on his return, gave the boy, who had arrived in the meantime, several plastic bags. J.A. 49-50. The boy approached the officers and asked how much they wanted. The officers requested two "dime bags" and exchanged two $10 bills for two plastic bags of marijuana. After leaving, the officers notified other police officers, who arrested petitioner and the boy. Upon searching petitioner, the police found the $10 bills that the officers had given the boy. J.A. 50.

2. Petitioner was charged with one count of using a minor to sell marijuana, in violation of California Health & Safety Code § 11361(a) (West Supp. 1998), one count of sale or transportation of marijuana, in violation of California Health & Safety Code § 11360(a) (West Supp. 1998), and one count of possession of marijuana for sale, in violation of California Health & Safety Code § 11359 (West Supp. 1998). The district attorney also made two allegations relevant to petitioner's sentence should he be convicted: first, that petitioner had a prior serious felony conviction

(strike) under California's Three Strikes Law, California Penal Code § 667(b)-(i) (West Supp. 1998);[1] and, second, that petitioner had served a prior prison term under California Penal Code § 667.5 (West Supp. 1998). Specifically, the district attorney alleged that petitioner had a July 2, 1992, conviction and prison term for assault with a deadly weapon, in violation of California Penal Code § 245(a)(1) (West Supp. 1998). J.A. 50.

In California Superior Court, petitioner pleaded not guilty to the charged offenses and denied the sentencing allegations. J.A. 50. He waived his right to a jury determination of the truth of the sentencing allegations and requested that the court pass on the allegations in a proceeding separate from the trial on the substantive offenses. The court granted petitioner's request, and a jury found him guilty of the substantive charges. J.A. 50-51.

3. On June 12, 1995, the proceedings reconvened for the determination of the truth of the sentencing allegations and the sentencing. J.A. 9-24. The prosecutor argued that the 1992 assault conviction was a prior serious felony under the Three Strikes Law, which classes assault with a deadly weapon as a "serious felony" if the defendant personally used the weapon, see California Penal Code §§ 667(d)(1), 1192.7(c)(23) (West Supp. 1998). The prosecutor explained that the charge to which petitioner pleaded guilty in the prior case was that he "committed a

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[1] The Three Strikes Law was first enacted by the California legislature and codified at California Penal Code § 667(b)-(i) (West Supp. 1998). A substantively identical provision was later enacted by public initiative and codified at California Penal Code § 1170.12(a)-(e) (West Supp. 1998). For clarity, all citations in this brief are to the legislatively enacted provision.

crime of assault with a deadly weapon, to wit, a stick upon the victim * * * and there w[ere] no other defendants." J.A. 12. Petitioner's counsel countered that a stick is not a "deadly weapon." J.A. 13. The court ruled that it could not "reweigh the issue" because "it was alleged a deadly weapon and [petitioner] pled guilty to that." J.A. 14, 51. The court stated that it was taking judicial notice of the conviction in the prior case. J.A. 15, 51. The prosecutor asked the court also to consider a "prior package," including an abstract of judgment, *ibid.*, which was received into evidence, as noted on the June 12, 1995, minute order. J.A. 7, 16, 51. The court then found true both sentencing allegations. J.A. 16, 51-52.

The court imposed an 11-year sentence, including five years on the first count, which the court doubled under the Three Strikes Law, California Penal Code § 667(e)(1) (West Supp. 1998), and a one-year enhancement for the prior prison term, under California Penal Code § 667.5 (West Supp. 1998). The court imposed a three-year sentence on count two, which the court stayed, and a two-year sentence on count three, which the court ordered petitioner to serve concurrently with the sentence on count one. J.A. 20, 52. When pronouncing the sentence, the court reiterated that "the issue on the prior * * * was submitted to me based upon evidence contained in [the] court file [from the prior offense]" as well as the prison package. J.A. 18.

4. Petitioner appealed, challenging the Three Strikes Law as a violation of due process. J.A. 52. On its own motion, the California Court of Appeal requested briefing on whether sufficient evidence supported the finding of the prior serious felony. J.A. 27-

29, 52. The Court of Appeal reversed the finding, ruling that the only evidence actually before the Superior Court was the prison package, and that evidence was insufficient to show personal use of the weapon. J.A. 42-45. The Court of Appeal also held that a redetermination of the truth of the allegation would be barred by the federal and state Double Jeopardy Clauses. J.A. 46.

5. The Supreme Court of California reversed the Court of Appeal on the double jeopardy issue. J.A. 75. The state Supreme Court noted (J.A. 57) this Court's historic reluctance to apply the Double Jeopardy Clause to sentencing determinations. It acknowledged (J.A. 58-59), however, that the Court made an exception in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), which held that a defendant, sentenced to life imprisonment rather than death in a capital sentencing proceeding that had all "the hallmarks of the trial on guilt or innocence," *id.* at 439, could not be resentenced to death on retrial following appeal. The California Supreme Court stated that, "[o]n its face," a proceeding to determine the truth of a strike allegation has "the hallmarks of the trial on guilt or innocence" but determined that the *Bullington* exception nonetheless does not apply to this case. J.A. 60. The state court noted that this Court has repeatedly suggested that *Bullington* does not apply to noncapital sentencing proceedings. J.A. 61. The court further explained that the sentencing proceedings here and in *Bullington* are "more unlike than alike," principally because of the absence in this case of statutorily defined aggravating and mitigating circumstances comparable to those in *Bullington*. J.A. 62. In addition, the court noted, the level of embarrassment, expense, and anxiety involved in the

sentencing proceeding here is far less than the level in capital sentencing proceedings and not "equivalent to that faced * * * at the guilt phase" of a trial. J.A. 63 (quoting *Bullington*, 451 U.S. at 445). Finally, the California Supreme Court explained that a strike finding is "merely a determination, for purposes of punishment, of the defendant's *status*, which * * * is readily determinable from the public record" (J.A. 63) and indeed may only be ascertained "from the *record* of the prior conviction" (J.A. 64). Given those distinctions, the court held that the Double Jeopardy Clause of the United States Constitution does not bar a redetermination of the truth of the strike allegation. J.A. 65, 71.[2]

SUMMARY OF ARGUMENT

This Court has "traditional[ly] refus[ed] to extend the Double Jeopardy Clause to sentencing." *Caspari* v. *Bohlen*, 510 U.S. 383, 392 (1994). In *Bullington* v. *Missouri*, 451 U.S. 430 (1981), the Court recognized a narrow exception to the principle that the Double Jeopardy Clause does not bar resentencing. The Court held that, once a defendant has been convicted of capital murder but sentenced only to life imprisonment in a proceeding that "in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence," he cannot, after retrial following appeal, be sentenced to death. *Id.* at 438.

Bullington should not be extended to noncapital sentencing proceedings. This Court has suggested that *Bullington* is limited to capital cases, see, *e.g.*, *Bohlen*, 510 U.S. at 392-393; *Pennsylvania* v. *Goldhammer*, 474 U.S. 28, 30 (1985), and that suggestion is sound. A critical component of *Bullington*'s rationale does not apply to noncapital sentencing. Resentencing in a noncapital case does not expose a defendant to the anxiety and ordeal of a trial on guilt or innocence or to any risk equivalent to the risk of an erroneous finding of guilt. *Bullington* is therefore best viewed as one in a series of cases in which the Court has demonstrated "an especially vigilant concern for procedural fairness" in capital sentencing. *Strickland* v. *Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part).

A State's voluntary decision to surround a particular noncapital sentencing proceeding with hallmarks of a trial on guilt or innocence is not sufficient to justify the application of *Bullington*'s double jeopardy rule. As a general matter, the "hallmarks" of a trial on guilt or innocence are not present in noncapital sentencing. Nor were they present in the proceeding at issue in this case. But even if they were, *Bullington* does not apply solely because the State voluntarily provides procedural protections. Rather, the applicability of *Bullington* depends both on the presence of those procedural hallmarks *and* on the unique stresses and anxieties experienced by a defendant facing the risk of a sentence of death. Petitioner's exposure to an enhancement of his term of imprisonment imposes no comparable ordeal.

[2] The California Supreme Court also held that the double jeopardy provision of the California Constitution does not bar a redetermination of the truth of the allegation. J.A. 72-74.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PETITIONER'S RESENTENCING

Under the Double Jeopardy Clause, an acquittal of a substantive criminal charge, whether rendered at trial or by a finding of insufficient evidence on appeal, finally disposes of the case and bars retrial. See *United States* v. *DiFrancesco*, 449 U.S. 117, 129-130 (1980). This Court has not recognized a similar finality in the pronouncement of a sentence, however. Rather, the Court has "traditional[ly] refus[ed] to extend the Double Jeopardy Clause to sentencing." *Caspari* v. *Bohlen*, 510 U.S. 383, 392 (1994).

In *Bullington* v. *Missouri*, 451 U.S. 430 (1981), the Court recognized a "narrow exception" to the principle that the Double Jeopardy Clause's bar on reprosecution after an acquittal of substantive criminal charges does not apply to sentencing determinations. *Schiro* v. *Farley*, 510 U.S. 222, 231 (1994). The Court held that, once a defendant has been convicted of the offense of capital murder but sentenced only to life imprisonment in a proceeding that "in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence," he cannot, after retrial following appeal, be sentenced to death. *Bullington*, 451 U.S. at 438.

Bullington's rationale had two critical components: First, the "unique" capital sentencing proceedings in Missouri after *Furman* v. *Georgia*, 408 U.S. 238 (1972), see *Bullington*, 451 U.S. at 442 n.15, had all "the hallmarks of the trial on guilt or innocence." *Id.* at 439. The decision not to impose the death penalty was therefore tantamount to an "acquittal" of that

penalty. *Id.* at 445. Second, because the anxiety and ordeal suffered in capital sentencing are "at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," and, because retrial would pose an "unacceptably high risk" of "an erroneously imposed death sentence," the Double Jeopardy Clause prohibits retrial. *Ibid.* The principal issue in this case is whether the *Bullington* exception applies outside the capital sentencing context.[3] This Court should confirm that *Bullington* applies only to sentencing in capital cases.

A. The Double Jeopardy Clause's Prohibition On Reprosecution After An Acquittal Generally Does Not Apply To Sentencing

"[T]he pronouncement of sentence has never carried the finality that attaches to an acquittal" of a substantive offense. *DiFrancesco*, 449 U.S. at 133. At common law, a judge could increase a sentence

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[3] This case does not, however, entail a straightforward application of *Bullington*. In that case, the petitioner was "acquitted" of the death penalty at his initial sentencing proceeding. Here, the sentencing court did not "acquit" petitioner of the strike allegation but instead found that the allegation was true. The "acquittal" occurred when the Court of Appeal found the evidence insufficient to support that finding. As a general matter, "the Double Jeopardy Clause does not bar the retrial of a defendant who has succeeded in getting his conviction set aside for error in the proceedings below." *Lockhart* v. *Nelson*, 488 U.S. 33, 39 (1988). An exception to that rule exists when a defendant's conviction is reversed solely because the evidence was insufficient to sustain the verdict. *Burks* v. *United States*, 437 U.S. 1, 18 (1978). The *Burks* exception does not apply, however, when an appellate court finds the evidence insufficient because it determines that some of the evidence was inadmissible and the remaining evidence cannot support the verdict. *Nelson*, 488 U.S. at 40.

imposed on a defendant at any time during the term of court in which the judge imposed the original sentence. *Id.* at 133-134. This Court has therefore held that a trial court may correct an error in sentencing after the sentence has been pronounced. See *Bozza* v. *United States*, 330 U.S. 160, 166-167 (1947). In addition, the Double Jeopardy Clause does not bar government appeals of sentences. *DiFrancesco*, 449 U.S. at 133-134. And "the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." *North Carolina* v. *Pearce*, 395 U.S. 711, 719-721 (1969); see also *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-24 (1973).

There is no double jeopardy bar to the use of prior convictions in sentencing a persistent offender. See, *e.g.*, *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). There is no double jeopardy bar to consideration in sentencing of conduct of which a defendant has been acquitted. See *United States* v. *Watts*, 117 S. Ct. 633, 636 (1997) (per curiam). And there is no bar to prosecution and conviction for conduct that was used to enhance punishment in a prior sentencing proceeding. See *Witte* v. *United States*, 515 U.S. 389, 398-399 (1995).

The limitations on the applicability of the Double Jeopardy Clause to sentencing reflect the fundamental distinction recognized by our criminal justice system between determining guilt and imposing sentence. A determination of guilt does more than authorize a government to impose punishment; it brands the person found guilty with a virtually indelible stigma in the eyes of his community and carries enormous collateral consequences. See, *e.g.*, *Price* v. *Georgia*, 398 U.S. 323, 331 n.10 (1970); *Missouri* v. *Hunter*, 459 U.S. 359, 373 (1983) (Marshall, J., dissenting); *Ball* v. *United States*, 470 U.S. 856, 865 (1985). The guilt determination is thus subject to unique constitutional protections. The government must prove guilt of a substantive offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970). Proof at trial is subject to the Confrontation Clause of the Sixth Amendment; and, for serious offenses, the defendant is entitled to a trial by jury.

The sentencing process, in contrast, may be more flexible. Generally, the government need only satisfy the preponderance of the evidence standard. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-93 (1986); cf. *Almendarez-Torres* v. *United States*, No. 96-6839 (Mar. 24, 1998), slip op. 24. The sentence may be (and in noncapital cases, typically is) imposed by the court rather than a jury. See *Spaziano* v. *Florida*, 468 U.S. 447, 457-465 (1984). And the Confrontation Clause does not limit the evidence that the sentencer may consider. Rather, the sentence may be based on "the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949).

B. The *Bullington* Exception Does Not Apply To Noncapital Sentencing

Bullington's exception to the principle that there is no double jeopardy bar on resentencing is limited to capital cases. This Court has suggested that *Bullington* does not apply outside capital sentencing. That limitation makes sense because, as the Court has frequently observed, death is a qualitatively different kind of punishment that may implicate different constitutional protections, and *Bullington*'s

rationale does not carry over to noncapital sentencing.[4]

1. Although the *Bullington* Court did not expressly limit its holding to capital sentencing, much in the opinion suggests that limitation. In *Bullington*, the Court "distinguished [its] contrary precedents, particularly *DiFrancesco*, on the ground that

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[4] It is not clear that the rule of *Burks*, see note 3, *supra*, would properly apply here even if *Bullington* were extended. The Court of Appeal characterized this case as involving "insufficient evidence" (J.A. 41), but it may more appropriately be viewed as involving a trial error similar to the error in *Nelson*, *supra*. In *Nelson*, sufficient inadmissible evidence supported the verdict but the admissible evidence was insufficient. 488 U.S. at 40. Here, at the proceeding on the strike allegation, which was "more like an informal hearing than a trial" (J.A. 64), the Superior Court stated that it was taking judicial notice of the conviction in the prior case in addition to receiving in evidence the prison package. J.A. 15. The prosecutor argued that a prior serious felony was proved because petitioner was the only defendant in that case, which involved an assault with a stick. J.A. 12. When sentencing petitioner on the underlying offense, the court reiterated that "the issue on the prior * * * was submitted to me based upon evidence contained in [the] court file [from the prior offense]." J.A. 18. Evidence in the record of the prior case (which the court would have been entitled to consider, J.A. 44) in fact establishes that petitioner himself wielded the stick in committing the prior felony. See page 19, *infra*. The Court of Appeal determined, however, that, because the minutes reflected that only the prison package was received into evidence (J.A. 42 n.4), that was the only evidence actually before the Superior Court, and the court's finding was therefore based on insufficient evidence that petitioner personally used the weapon, J.A. 43-44 & nn. 5-7. At the very least, the circumtances of this case indicate the difficulty of applying the notion of an acquittal based on insufficient evidence to a noncapital sentencing determination.

'[t]he history of sentencing practices is of little assistance to Missouri in this case, since the sentencing procedures for capital cases instituted after the decision in *Furman* [v. *Georgia*, 408 U.S. 238 (1972),] are unique.'" *Bohlen*, 510 U.S. at 392 (quoting *Bullington*, 451 U.S. at 441-442 n.15). The *Bullington* Court took care to distinguish the "usual sentencing proceeding" from the capital sentencing at issue (*id.* at 443) and to reaffirm the general inapplicability to sentencing of the Double Jeopardy Clause's prohibition on retrial after acquittal (*id.* at 437-438). *Bullington* involved sentencing by a jury, but in *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), this Court applied *Bullington* to capital sentencing by a judge. In describing *Bullington*, the Court noted that *Bullington* equated "the anxiety and ordeal suffered by a capital defendant in Missouri's capital sentencing proceeding" with the degree of suffering experienced by a defendant at the guilt stage of a trial. *Rumsey*, 467 U.S. at 209.

Later cases have explained that "[b]oth *Bullington* and *Rumsey* were capital cases, and [the Court's] reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." *Bohlen*, 510 U.S. at 392. In *Pennsylvania* v. *Goldhammer*, 474 U.S. 28 (1985) (per curiam), four years after *Bullington*, the Court reaffirmed that the Double Jeopardy Clause does not bar resentencing after an appeal in a noncapital case. The Court reiterated that "the decisions of this Court 'clearly establish that sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.'" *Id.* at 30 (bracketed phrase included by the *Goldhammer Court*). The Court subsequently explained that *Goldhammer* "strongly

suggested that *Bullington* was limited to capital sentencing." *Bohlen*, 510 U.S. at 393.

2. This Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact-finding." *Strickland* v. *Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part). For that reason, "[t]ime and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Bohlen*, 510 U.S. at 392 (quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 913-914 (1983) (Marshall, J., dissenting) (citing *Bullington* as an example of this practice)).

As petitioner's amicus National Association of Criminal Defense Lawyers notes (Br. 5), many of the special protections in capital sentencing have been grounded in the Eighth Amendment. Most basically, in *Furman* v. *Georgia*, 408 U.S. 238 (1972), and *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court held that sentencing discretion that is routinely tolerated in noncapital cases is impermissible in capital cases. See *id.* at 189 (plurality opinion of Stewart, J.). See also *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, J.) (holding mandatory death sentences unconstitutional but acknowledging that the practice of "individualized sentencing determinations [in the noncapital context] generally reflects simply enlightened policy rather than a constitutional imperative"); *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion of Burger, C.J.) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

The Court's "death is different" rulings, however, have also been grounded in other constitutional provisions. In *Gardner* v. *Florida*, 430 U.S. 349 (1977), for example, the Court held that "due process" prohibits imposition of a death sentence based in part on information which the defendant had no opportunity to deny or explain. *Id.* at 362 (plurality opinion of Stevens, J.). Justice Stevens explained that the outcome in that case depended in part on the recognition that "death is a different kind of punishment from any other which may be imposed in this country." *Id.* at 357. In *Green* v. *Georgia*, 442 U.S. 95 (1979) (per curiam), the Court held that the Due Process Clause requires that a defendant be allowed to introduce at capital sentencing hearsay evidence supporting his contention that he did not participate directly in the murder. In dissent, then-Justice Rehnquist noted the unusual nature of the ruling and attributed it to the fact that the case involved the death penalty. See *id.* at 98 (Rehnquist, J., dissenting).

The Court has also held that, in judging a claim of ineffectiveness of counsel in violation of the Sixth Amendment, the same standard applies at capital sentencing and at trial on a substantive offense, even though a more relaxed standard may apply at ordinary sentencing. *Strickland*, 466 U.S. at 686. And, in *Estelle* v. *Smith*, 451 U.S. 454 (1981), the Court held that the Fifth Amendment precludes the use at capital sentencing of statements made by a defendant during a court-ordered psychiatric examination, unless the defendant was informed that he could remain silent and that any statements he made might be used against him at sentencing. Although the statements were used "only to determine punishment after conviction, not to establish guilt," the Court held that

the Fifth Amendment applied "[g]iven the gravity of the decision made at the penalty phase." *Id.* at 362-363.[5]

3. Viewing *Bullington* in the context of those cases and limiting its holding to capital sentencing is sensible, because a critical component of *Bullington*'s rationale does not carry over to noncapital sentencing. As we explained at pages 8-9, *supra*, one key ingredient supporting *Bullington*'s holding was the Court's perception that the sentencing proceeding at issue had all the hallmarks of the immediately preceding trial on capital murder, so a sentence of life imprisonment could be interpreted as an "acquittal" of a death sentence.[6] An equally essential ingredient, however, was that the animating principles of the Double Jeopardy Clause require that the same finality accorded to an acquittal of guilt on substantive charges also attach to the "acquittal" of a death sentence, because of the ordeal experienced by the defendant in a formal proceeding to impose the death penalty. That prerequisite is not satisfied in noncapital cases.[7]

As the Court explained in *Bullington*, 451 U.S. at 445, the central purpose of the Double Jeopardy Clause is to prevent "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). The ordeal and anxiety suffered by a defendant at the

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[5] Every member of the *Bullington* majority has authored an opinion subscribing to the view that the difference between the death penalty and other punishments warrants imposition of special protections at capital sentencing. See, *e.g.*, *Schiro*, 510 U.S. at 238 (Blackmun, J.) ("The unique nature of modern capital sentencing proceedings identified in *Bullington* derives from the fundamental principle that death is 'different,' and that heightened reliability is required at all stages of the capital trial." (internal citations omitted)); *Strickland*, 466 U.S. at 704-705 (Brennan, J.); *Barefoot*, 463 U.S. at 913-914 (Marshall, J.); *Gardner*, 430 U.S. at 357 (Stevens, J.); *Furman*, 408 U.S. at 306 (Stewart, J.).

[6] In our amicus brief and argument to the Court in *Caspari* v. *Bohlen*, *supra*, we focused on this component of the *Bullington* rationale, consistent with the absence from the sentencing proceeding in *Bohlen* of the hallmarks of the immediately preceding trial on guilt or innocence. See 92-1500 U.S. Amicus Br. at 17-19. Our focus on the "hallmarks" aspect of *Bullington* does not mean, however, that it is the sole requirement for application of the *Bullington* exception. As we have explained, existence of the hallmarks of the trial on the underlying offense is a necessary but not sufficient precondition to *Bullington*'s bar on resentencing. The question presented in this case presupposes that the sentencing proceeding here possessed the hallmarks of the trial on guilt or innocence. As we explain *infra* at pages 20-22, we believe the proceeding in fact lacked certain critical features of a criminal trial, but *Bullington*'s inapplicability to noncapital sentencing proceedings does not depend on that view.

[7] Contrary to the assertion of petitioner's amicus California Public Defenders Association (Br. 21-22), a refusal to extend *Bullington* to noncapital sentencing will not give the States license to avoid the Double Jeopardy Clause by redefining elements of a substantive offense as sentencing enhancements. The Due Process Clause would provide a check against redefinition of the elements of an underlying offense as sentencing enhancements to such an extent that the enhancements became "a tail which wag[ged] the dog of the substantive offense," *McMillan*, 477 U.S. at 88. The Three Strikes Law, a recidivist enhancement, certainly poses no such risk. See *Almendarez-Torres*, slip op. 15-23.

penalty phase of a capital murder trial are "at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." *Bullington*, 451 U.S. at 445; see also *Rumsey*, 467 U.S. at 209; *Spaziano*, 468 U.S. at 458. That is true because a death sentence "is different [from other sentences] in both its severity and its finality." *Gardner*, 430 U.S. at 357. A defendant who has once run the gauntlet of a capital sentencing proceeding attended by all the formality of a trial, and who has received a noncapital sentence, has suffered an ordeal that has no counterpart in the criminal process, except for the trial on guilt itself.

In a noncapital case, however, "[t]he defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him." *DiFrancesco*, 449 U.S. at 136. Of course, ordinary resentencing entails some additional anxiety and insecurity. But some uncertainty is unavoidable in the sentencing context because the "Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *Id.* at 136-137. For example, probation or parole may be revoked and imprisonment imposed after the pronouncement of sentence, thus upsetting the defendant's expectation of release. The Double Jeopardy Clause, however, does not protect that expectation.

Resentencing in noncapital cases also does not subject the defendant to "risk of being harassed and then convicted, although innocent." *DiFrancesco*, 449 U.S. at 136. Although this Court has recognized the concept of "innocence" of the death penalty, see *Bullington*, 451 U.S. at 445; *Sawyer* v. *Whitley*, 505 U.S. 333 (1992), it has not recognized the notion of

"innocence" of a noncapital sentence. The concepts of "innocence" and "error" make little sense in traditional sentencing, in which the sentencer makes a highly discretionary choice among a range of possible sentences. See *Bullington*, 451 U.S. at 443-444; *DiFrancesco*, 449 U.S. at 136-137.

In the context of a sentencing enhancement determination, such as the finding on the strike allegation here, the concept of "error" has more meaning. If petitioner had not been convicted of a prior serious felony, then a finding that the strike allegation was true would be erroneous. Redetermination of the truth of the allegation should nevertheless be permitted, because redetermination will reduce, rather than increase, the likelihood of error. As the California Supreme Court explained (J.A. 63-65), the strike finding requires only a determination of status, and the admissible evidence is limited to the prior record. Strike status is thus

> a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence.

Bohlen, 510 U.S. at 396. In fact, on remand from the California Supreme Court in this case, the Superior Court found that the record in petitioner's 1992 assault case established that he personally used the weapon and therefore supported the strike allegation. See *People* v. *Monge*, No. KA025876 (L.A. Super. Ct.,

Dep't East E. Jan. 7, 1998). Thus, a prohibition on resentencing might reduce, rather than increase, the accuracy of sentencing proceedings without advancing the core values underlying the Double Jeopardy Clause.

C. The Presence Of Procedural Protections At Petitioner's Noncapital Sentencing Does Not Bar His Resentencing

Petitioner contends that the Double Jeopardy Clause prohibits his resentencing because his sentencing proceeding had the hallmarks of a trial on a substantive offense. Even if petitioner were correct that the existence of a bar on resentencing turns solely on whether a sentencing proceeding has those hallmarks, he would not prevail here. The hallmarks identified by *Bullington* are rarely, if ever, present in noncapital sentencing, and they were not present at petitioner's sentencing proceeding. In any event, petitioner is incorrect that the mere presence of procedural protections at sentencing triggers a bar on resentencing.

1. *Bullington* identified three critical "hallmarks": First, the sentencer was limited to two options. See 451 U.S. at 438. Second, the sentencer's discretion was significantly curtailed by specific substantive standards, and the sentencing decision was based on evidence introduced in a trial-like proceeding. *Ibid.* Third, the prosecution had to prove certain facts beyond a reasonable doubt. *Ibid.* Those hallmarks are generally not present in noncapital sentencing. The sentencer typically has a broad range of options. The Constitution does not require rigid substantive standards or trial-like proceedings,

and those generally are not provided. Finally, proof is usually by preponderance of the evidence.

Even in this case, in which California chose to provide many procedural protections at sentencing, the critical *Bullington* hallmarks were not present.[8] In arguing that those hallmarks were present, petitioner mistakenly focuses (Pet. Br. 36-38) solely on the strike determination. Petitioner overlooks that sentencing always involves factual determinations. Those determinations, even if they must be based on proof beyond a reasonable doubt and made under trial-like conditions in a capital case, are not equivalent to "acquittals" or "convictions." See *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986) (finding on particular aggravating circumstance does not "convict" or "acquit" defendant).

When the entire sentencing process is considered, it is clear that, unlike in *Bullington*, a range of sentences (between three and 15 years) was available in this case. The Superior Court retained considerable discretion in setting the underlying sentence and could have dismissed either or both sentencing allegations, even after findings that the allegations were true. See California Health & Safety Code §§

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[8] The question presented does assume that petitioner's sentencing proceeding had those hallmarks, but there is a substantial argument to the contrary. Even if we are wrong, the debatability of the existence of the *Bullington* hallmarks is in itself a powerful argument in favor of a bright-line rule that the Double Jeopardy Clause does not bar resentencing in noncapital cases. Absent that rule, state and federal judges will be forced to resolve whether each of the multitude of sentencing provisions that have been enacted by Congress and the fifty state legislatures has sufficient hallmarks to trigger double jeopardy protection.

11359, 11360(a), 11361(a) (West Supp. 1998); California Penal Code §§ 654(a), 1170(b), 1385(a) (West Supp. 1998); California Rules of Court 408(a), 420, 421, 423 (West 1997); *People* v. *Superior Court (Romero)*, 917 P.2d 628, 644 n.11, 647 (Cal. 1996); *People* v. *White Eagle*, 56 Cal. Rptr. 2d 749, 756 (5th Ct. App. 1996). Also absent in this case were substantive standards guiding the sentencing discretion comparable to the statutory aggravating and mitigating factors in *Bullington*. The court's discretion to dismiss the strike allegation was constrained only by the requirement that its decision be "in furtherance of justice," see *Romero*, 917 P.2d at 647, and the standards limiting its discretion in setting the base sentence were not comparable to those provided in *Bullington*. See Pet. Br. 39-40; Amicus Br. of Cal. Pub. Def. Ass'n 8-9.

2. In any event, as we have explained, the Double Jeopardy Clause does not bar resentencing merely because the government chooses to provide the criminals being sentenced with some trial-like protections. It would be a powerful disincentive to the voluntary provision of procedural safeguards at sentencing if, once a State provides a certain level of protections, it must provide every protection that the Constitution mandates for a criminal trial. Cf. *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2083 (1997) (that Kansas chose to provide trial-like safeguards in civil commitment proceeding did not make that proceeding criminal and subject to Double Jeopardy Clause). Such a rule would also ignore a critical component of the reasoning in *Bullington*. This Court has repeatedly recognized that *Bullington* rested not only on the presence of the hallmarks of a trial, but also on the conclusion that the principles underlying the Double Jeopardy Clause require that an

"acquittal" of a death sentence have the same finality accorded an acquittal of guilt of a substantive criminal offense. See *Rumsey*, 467 U.S. at 209; *Spaziano*, 468 U.S. at 458.

The dual nature of *Bullington*'s rationale also disposes of petitioner's contention (Pet. Br. 24-25, 42) that the Court's decision not to overrule *Stroud* v. *United States*, 251 U.S. 15 (1919), must mean that *Bullington* applies to noncapital sentencing. *Bullington*'s failure to overrule *Stroud* indicates only that *Bullington* does not necessarily apply to *all* capital sentencing. In *Stroud*, the Court held that the Double Jeopardy Clause did not bar a defendant from being sentenced to death on retrial following appeal, even though he had been sentenced only to life imprisonment in his initial sentencing proceeding. Resentencing was permissible in *Stroud* because the sentencing proceeding in that case, which preceded *Furman*, *supra*, and *Gregg*, *supra*, lacked the hallmarks of a trial on guilt or innocence. See *Bullington*, 451 U.S. at 439. Resentencing is permissible in noncapital cases, whether or not the sentencing proceedings have those hallmarks, because resentencing would neither impose anxiety and ordeal comparable to a trial on guilt of a substantive offense nor present a risk comparable to that of an erroneous conviction.

Petitioner also finds no support in the due process cases on which he relies (Pet. Br. 18-21). Those cases establish only that the protections afforded by the Due Process Clause during sentencing, see *Townsend* v. *Burke*, 334 U.S. 736 (1948), vary depending on the characteristics of the sentencing proceeding at issue. See *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Oyler* v. *Boles*, 368 U.S. 448 (1962); *Chewning* v.

Cunningham, 368 U.S. 443 (1962); *Chandler* v. *Fretag*, 348 U.S. 3 (1954). Those cases do not address the question whether the Double Jeopardy Clause bars resentencing.

In fact, in *Chandler* and *Chewning*, the Court held only that the petitioners were entitled to counsel at the sentencing proceedings in question. Those holdings are unremarkable because the Court later confirmed that the Sixth Amendment right to counsel applies to *all* sentencing proceedings. See *Mempa* v. *Rhay*, 389 U.S. 128 (1967). In *Oyler*, the Court simply explained that the right to counsel recognized in *Chandler* and *Chewning* would not be meaningful without notice of the charges and an opportunity to be heard. See *Oyler*, 368 U.S. at 452.

At the end of the *Bullington* opinion, the Court briefly adverted to *Specht*, which held that a person subject to an enhanced sentence under the Colorado Sex Offenders Act also has the right to be confronted with the witnesses against him, to cross-examine them, and to present evidence of his own. See *Bullington*, 386 U.S. at 610. *Specht*, however, did not decide any question under the Double Jeopardy Clause. The Court, moreover, has hesitated to "read too much into" *Specht*, see *McMillan*, 477 U.S. at 88-89, and has repeatedly declined to extend its reasoning to other cases. See *ibid.*; *Almendarez-Torres*, slip op. 17.

Neither *Specht* nor any other case cited by petitioner held that the noncapital sentencing proceedings at issue were entitled to all the constitutional protections afforded at trial, such as the protection against double jeopardy. See, *e.g.*, *Hollis* v. *Smith*, 571 F.2d 685, 690 (2d Cir. 1978) (Friendly, J.) (*Specht* did not mandate jury determination or

proof beyond a reasonable doubt). "The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights." *Gardner*, 430 U.S. at 358 n.9. Indeed, petitioner acknowledges (Pet. Br. 27 n.8) that the applicability of the Double Jeopardy Clause is not necessarily coextensive with other constitutional protections. Petitioner therefore concedes (Pet. Br. 14-15), as he must, that the Double Jeopardy Clause does not bar resentencing in traditional sentencing proceedings, even though the Due Process Clause and the Sixth Amendment's right to counsel apply to those proceedings. As we have explained above, the Double Jeopardy Clause also does not bar resentencing in noncapital proceedings that have more procedural protections than traditional sentencing, including the proceeding in this case.

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

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